

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TIM J. PIATKOWSKI**  
Claimant

VS.

**XEROX CORPORATION**  
Respondent

AND

**ZURICH INSURANCE COMPANY**  
Insurance Carrier

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Docket No. 205,533

## ORDER

Xerox Corporation and its insurance carrier appealed the Award dated October 7, 1997, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on March 13, 1998.

## APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for Mr. Piatkowski. Stephen J. Jones of Wichita, Kansas, appeared for Xerox and its insurance carrier.

## RECORD AND STIPULATIONS

The record and the parties' stipulations are listed in the Award.

## ISSUES

Mr. Piatkowski developed bilateral plantar fasciitis that ultimately required surgery. The Administrative Law Judge found claimant had a 64 percent task loss and a 100 percent wage loss and awarded claimant permanent partial general disability benefits for an 82 percent work disability. Xerox contends (1) Mr. Piatkowski has not made a good faith effort to find appropriate employment and, therefore, should not receive a work disability; (2) any task loss should be reduced to 54.5 percent; and (3) the permanent partial general disability should be reduced by an amount for preexisting impairment.

The nature and extent of Mr. Piatkowski's disability is the only issue before the Appeals Board on this review. But, in deciding that issue, the Appeals Board must decide the following:

- (1) Did Mr. Piatkowski make a good faith effort to obtain appropriate employment after being released to return to work?
- (2) What is the difference in Mr. Piatkowski's pre- and post-injury wages and what is his task loss?
- (3) Does K.S.A. 44-501(c) require Mr. Piatkowski's permanent partial general disability be reduced for a preexisting condition that was neither known nor symptomatic?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds as follows:

- (1) The claimant, Tim J. Piatkowski, alleged he injured both feet while working for Xerox Corporation as a copier technician from January through October 15, 1995. The Administrative Law Judge found Mr. Piatkowski's injury arose out of and in the course of his employment with Xerox and also determined that the appropriate date of accident for computation of benefits was October 15, 1995, his last day of work. The parties did not appeal either of those findings.
- (2) The symptoms in Mr. Piatkowski's feet began in January 1995 when he was pushing a heavy copier away from a wall. While pushing that copier, he felt a pop in his feet, then pain. Before that incident, he did not have any problems with his feet although he had diabetes since age seven. Despite his symptoms, Mr. Piatkowski continued to work for Xerox for several months until being terminated.
- (3) The parties stipulated that Mr. Piatkowski's average weekly wage for this accidental injury is \$548.10.
- (4) Mr. Piatkowski worked for Xerox for eight years. While he was undergoing medical treatment, Xerox terminated him on October 15, 1995, because it believed he would be unable to perform his job.
- (5) As a result of his injuries, Mr. Piatkowski underwent left foot surgery to release the plantar fascia and decompress the nerve to the abductor digiti quinti in January 1996 and the same surgery on the other foot in May 1996. When Mr. Piatkowski's surgeon released him from treatment in November 1996, he was restricted to sedentary work.

(6) After his termination from Xerox, Mr. Piatkowski undertook a vocational rehabilitation evaluation and an unsuccessful job search. During that program, he applied for employment with 96 different employers. When he testified at the regular hearing held in July 1997, he remained unemployed despite his continued efforts to find a job. Mr. Piatkowski has made a good faith effort to find appropriate employment.

(7) Mr. Piatkowski's surgeon, board-certified orthopedic physician Steven Howell, M.D., believes claimant has a 15 percent functional impairment to each foot, or an 11 percent whole body functional impairment, according to the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment. The doctor attributes one-half of the 11 percent to the work-related injury and one-half to diabetes.

(8) At the request of Xerox and its insurance carrier, in January 1996 Mr. Piatkowski saw board-certified orthopedic physician Robert A. Rawcliffe, Jr., M.D. He diagnosed plantar fasciitis together with diabetic neuropathy and believes Mr. Piatkowski now has a 25 percent functional impairment to each leg or a 19 percent whole body functional impairment. Also, he believes Mr. Piatkowski can be employed in a sedentary occupation only.

(9) Giving equal weight to the doctors' impairment ratings, the Administrative Law Judge found Mr. Piatkowski had sustained a 15 percent whole body functional impairment. The Appeals Board adopts that finding as its own.

(10) Considering the testimony of Drs. Howell and Rawcliffe, along with the task analysis of vocational rehabilitation consultant Karen Crist Terrill, the Appeals Board finds Mr. Piatkowski has lost the ability to perform 57 percent of the tasks he performed in substantial and gainful employment during the 15-year period immediately preceding the period of accident in question. That task loss percentage takes into account the task of driving that Ms. Terrill testified was an essential task that Mr. Piatkowski had performed and that she had omitted from her initial analysis.

(11) The difference between Mr. Piatkowski's average weekly wage before and after the accidental injury is 100 percent.

(12) The Appeals Board adopts the findings set forth in the Award to the extent they are not inconsistent with the above.

#### CONCLUSIONS OF LAW

The parties did not appeal the Judge's finding that claimant sustained a work-related injury to his feet or the finding that the appropriate date of accident for computation purposes was October 15, 1995. Therefore, the Appeals Board adopts those findings as its own.

Because his is an "unscheduled" injury, K.S.A. 44-510e governs Mr. Piatkowski's entitlement to permanent partial general disability benefits:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

Averaging the 57 percent task loss with the 100 percent difference in pre- and post-injury wages, the Appeals Board finds Mr. Piatkowski has a 79 percent permanent partial general disability. This is a slight reduction from the 82 percent permanent partial general disability that the Administrative Law Judge found as it takes into account the additional driving task that claimant performed before his accidental injury and that Ms. Terrill indicated was an essential job task.

Xerox contends Mr. Piatkowski's award should be reduced because of preexisting peripheral neuropathy in his feet. Xerox relies upon K.S.A. 44-501(c):

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

That statute, however, was intended to prevent pyramiding and prevent a worker from recovering benefits from a preexisting impairment. But, when a preexisting condition is neither known nor symptomatic nor disabling in any discernible manner, the condition does not constitute an impairment and the statute does not apply.

Because Mr. Piatkowski's feet were asymptomatic and did not appear to either impair or disable him in any manner, he did not have an impairment to his feet before the period of accidental injury in question. Therefore, the award of compensation should not be reduced.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the findings entered by Administrative Law Judge John D. Clark dated October 7, 1997, should be, and hereby are, modified to reflect the 79% permanent partial general disability. The

Award, however, is affirmed as it qualifies for the maximum total award as determined by the Administrative Law Judge.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Tim J. Piatkowski, and against the respondent, Xerox Corporation, and its insurance carrier, Zurich Insurance Company, for an accidental injury which occurred October 15, 1995, and based upon an average weekly wage of \$548.10 for 59.79 weeks of temporary total disability compensation at the rate of \$326 per week or \$19,491.54, followed by 246.96 weeks at the rate of \$326 per week or \$80,508.46, for a 79% permanent partial general disability, making a total award of \$100,000.

As of March 31, 1998, there is due and owing claimant 59.79 weeks of temporary total disability compensation at the rate of \$326 per week or \$19,491.54, followed by 68.50 weeks of permanent partial disability compensation at the rate of \$326 per week in the sum of \$22,331 for a total of \$41,822.54, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$58,177.46 is to be paid for 178.46 weeks at the rate of \$326 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Zongker, Wichita, KS  
Stephen J. Jones, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director